

# ORIGINAL Transcript of Proceedings

BEFORE THE  
**Federal Communications Commission**

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In the Matter of:

:

MM DOCKET NO.

92-70

HOBSON, ALABAMA

:

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JUN 30 1992

Federal Communications Commission  
Office of the Secretary

DATE: June 18, 1992

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## **Capital Hill Reporting**

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## FEDERAL COMMUNICATIONS COMMISSION

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## PREHEARING CONFERENCE

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RECEIVED

JUN 30 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

IN THE MATTER OF

APPLICATIONS OF

SABLE COMMUNITY BROADCASTING  
CORPORATION

GADSDEN STATE COMMUNITY COLLEGE

TRINITY CHRISTIAN ACADEMY

FOR CONSTRUCTION PERMIT FOR NEW  
AND MODIFIED NONCOMMERCIAL FM  
FACILITIES ON CHANNEL 217MM DOCKET NO.  
92-70FILE NO.  
BPED-851003MBFILE NO.  
BPED-860307MKFILE NO.  
BPED-860512MBThursday,  
June 18, 1992Courtroom #1  
2000 L Street, N.W.  
Washington, D.C.

The above-entitled matter came on for  
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE ARTHUR I. STEINBERG  
Administrative JudgeCapital Hill Reporting  
(202) 466-9500

**APPEARANCES:****On Behalf of Gadsden State Community College:**

M. SCOTT JOHNSON, ESQ.  
JAMES K. EDMUNDSON, ESQ.  
Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900, East Tower  
Washington, D.C. 20005  
202/408-7100

**On Behalf of Sable Community Broadcasting Corporation:**

MAUDINE J. HOLLOWAY, ESQ.  
MARCUS REID, ESQ.  
Reid & Thomas  
501 Southtrust Bank Building  
1000 Quintard Avenue  
Anniston, Alabama 36201

**On Behalf of the FCC:**

PAULETTE LADEN, ESQ.  
Hearing Branch, Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W. Room 7212  
Washington, D.C. 20554

P R O C E E D I N G S

9:06 a.m.

JUDGE STEINBERG: Okay, we're on the record. Now this is a pre-hearing conference in MM Docket No. 92-70 involving mutually exclusive applications for construction permits for new and modified, noncommercial FM facilities in Hobson City, Gadsden and Oxford, Alabama.

The case was designated for hearing on April 15, 1992. By order released April 22, 1992, the Chief Administrative Law Judge assigned the case to me and set the date for hearing for September 1, 1992.

In accordance with the Commission's new policies for expediting the hearing process, the September 1st hearing date was intended to be a firm date.

Let me take the appearances of the parties now. For Sable Community Broadcasting Corporation? Let the record reflect no response.

For Gadsden State Community College?

MR. EDMUNDSON: James K. Edmundson, M. Scott Johnson.

JUDGE STEINBERG: For Trinity Christian Academy? Let the record reflect no response.

The Chief, Mass Media Bureau?

1 MS. LADEN: Paulette Laden.

2 JUDGE STEINBERG: Let me just go through  
3 initially the pleadings that I have pending in front  
4 of me and then I'm going to ask if I'm missing any  
5 just so that we're all on the same page.

6 Unfortunately, the two parties who most  
7 need to be here aren't here and whatever goes on this  
8 morning, whatever rulings I make, they're going to be  
9 bound by and they'll just have to get a copy of the  
10 transcript and read it.

11 The first thing pending I have is a motion  
12 to dismiss the application of Sable which was filed on  
13 May 29, 1992 by Trinity. Sable filed an opposition on  
14 June 9th and Trinity a reply to opposition on June  
15 16th.

16 The next thing I have is a motion for  
17 acceptance nunc pro tunc, a late filed notice of  
18 appearance filed on June 4, 1992 by Sable. Also filed  
19 on that date by Sable was a notice of appearance.

20 An opposition of the motion for acceptance  
21 was filed by Trinity on June 10th.

22 The third thing that I have in front of me  
23 is a motion for summary decision filed by Gadsden on  
24 June 8, 1992, and by my calculation responses are due  
25 to be filed on June 22nd.

1 Grant of this motion will permit the  
2 severance and grant of the Gadsden application.

3 The final thing I have in front of me is  
4 a petition for leave to amend filed on June 9, 1992 by  
5 Sable and responses are due to be filed today, June  
6 18th.

7 Does anybody have any, know of anything  
8 other than that that's pending apart from I guess  
9 Sable filed some errata to various pleadings?

10 Okay.

11 MR. EDMUNDSON: I think that perhaps  
12 Trinity indicated that they were not going to respond  
13 to the motion for leave to amend.

14 I think they said that in their reply to  
15 the opposition, their June 16 reply.

16 JUDGE STEINBERG: Did they? Okay. I  
17 just, I received the reply yesterday and I haven't  
18 read it. I haven't read anything other than the -- I  
19 guess I just skimmed through it.

20 Okay. Anyway, what I'm going to do is  
21 rule on these things when I can and I hope to be able  
22 to rule on some of them next week. I have a hearing  
23 starting Tuesday and it depends on how that goes and  
24 how many days that takes. It's going to start Tuesday  
25 and it will go for a little while and then it will

1 continue the following week to accommodate witnesses,  
2 and if I can crack free a couple days next week, I'll  
3 rule on some of this if I can. If I can't, I'll just  
4 rule on that after that.

5 The next subject I have is settlement, and  
6 unfortunately the questions I have are directed toward  
7 the people that aren't here, but let me go through  
8 them anyway.

9 Assuming that I grant Gadsden's motion for  
10 summary decision and grant its application and  
11 assuming that I accept Sable's notice of appearance,  
12 that will leave the applications of Sable and Trinity  
13 in hearing.

14 Let me just say that the assumption that  
15 I accept Sable's notice of appearance is just that.  
16 It's an assumption and for purposes of the conference  
17 today, I have to make that assumption. By saying that  
18 I'm making that assumption does not mean that I intend  
19 to grant the motion to accept. It doesn't mean that  
20 I'm going to deny it. I don't know what I'm going to  
21 do because I haven't really sat down and considered  
22 it.

23 I wanted to know from the people that  
24 aren't here whether any discussions have taken place  
25 between Sable and Trinity, either between counsel or

1 the applicants themselves with respect to settlement.

2 Have any discussions taken place with  
3 respect to time sharing? If they have taken place I  
4 want somebody to summarize the substance of the  
5 discussion. If they haven't taken place, I want to  
6 know why they haven't taken place and direct the  
7 applicants to consider these things, consider  
8 settlement and time sharing, and I was going to give  
9 a little spiel about how settlement is in the public  
10 interest.

11 MR. EDMUNDSON: Your Honor, I think that  
12 Sable and Trinity, I think there have been some  
13 discussions. I mean I couldn't speak to the substance  
14 of them all, but I believe there have been some  
15 discussions concerning the prospect of settlement, but  
16 I think that -- it was my impression at least on the  
17 Trinity side of the fence and I certainly can't  
18 represent for Trinity, but I think they would probably  
19 not be entertaining settlement discussions until  
20 you've ruled.

21 JUDGE STEINBERG: Right. Okay, then the  
22 next thing I want to know is, again, have any  
23 discussions taken place between Sable and Trinity  
24 regarding the resolution of the mutual exclusivity  
25 through technical or engineering means? I want to



1 know whether this is a realistic possibility and I  
2 want to direct them to explore that.

3 MR. EDMUNDSON: Again, not to overreach  
4 here, but my understanding is those two communities  
5 that have been applied for are essentially side by  
6 side, so that I would -- I personally and what we're,  
7 what they've applied for are Class A broadcast  
8 stations. So what would be my impression, you  
9 couldn't work out a settlement at least within CO and  
10 three adjacent channels.

11 Now whether there is a channel way up in  
12 the ether that would do it, I don't have the slightest  
13 idea.

14 JUDGE STEINBERG: But if I could get it,  
15 it would be worth exploring.

16 MR. EDMUNDSON: Yeah.

17 JUDGE STEINBERG: The next subject that I  
18 had, was going to bring up was the scope of the issues  
19 and whether there were any discussions held for the  
20 purpose of agreeing on the scope of the issues or  
21 whether any questions regarding the scope of the  
22 issues?

23 I had some questions myself to tell you  
24 the truth.

25 (Laughter)

1                   It's one that's pretty straight forward.  
2                   It's the financial issue and I was going to --  
3                   according to paragraph 3 of the hearing designation  
4                   order Sable says it's going to cost \$49,650 to  
5                   construct an operator's proposed facility and I was  
6                   just going to perhaps note for the record that if this  
7                   hearing, if this case went to hearing and went through  
8                   hearing and went through an initial decision and went  
9                   through the usual appeals that the legal fees are  
10                  going to dwarf, probably dwarf the cost of putting the  
11                  station on the air and I wanted to know if that was  
12                  every pointed out to the client perhaps.

13                  But I don't think there's any question on  
14                  the scope of issue 1.

15                  Issue 2 is a pending motion for summary  
16                  decision on that issue, so I'm not going to get  
17                  involved in it.

18                  Issue 3 is a contingent issue which  
19                  involves Sable and I'm not going to get into that  
20                  issue.

21                  Issue 4 is three different issues. We've  
22                  got 4a, b and c.

23                  With respect to 4a it's an area of pops  
24                  issue and what I want is a joint exhibit on that issue  
25                  and I would direct the applicants to prepare a joint

1 exhibit.

2 Issue 4b, the basic question I had was who  
3 in the world has the burden of proceeding and the  
4 burden of proof on that issue. I don't know and I  
5 wanted to discuss that this morning, but I guess I  
6 can't.

7 Issue 4c is a straight 307b issue and the  
8 burdens of, both burden of proof and burden of  
9 proceeding are hereby placed on each of the  
10 applicants. If Trinity believes it deserves a  
11 preference, it's got to satisfy its burden of proof  
12 that its community is to be preferred and if Sable  
13 wants to resolve the issue in its favor, it has to  
14 sustain the burden of proceeding or the burden of  
15 proof that its community should be preferred. So that  
16 takes care of that issue, issue 4.

17 Issue 5 and this goes back to paragraph 12  
18 in issue 5. I don't understand paragraph 12 and I  
19 don't know that anybody does but I think with the  
20 Gadsden's amendment and the probability of Gadsden  
21 being severed and granted, I think that moots much of  
22 paragraph 12 and turns issue 5 into just a contingent  
23 paragraph issue, namely if neither Sable or Trinity's  
24 immunities are to be preferred, then we have to go to  
25 a comparative issue.

1                   Now, there are certain, the criteria for  
2 comparative issue and for an educational station are  
3 different from the criteria in a commercial sense and  
4 what I wanted to do is have the applicants, Sable and  
5 Trinity, brief this matter for me, namely, tell me  
6 what the criteria are, what falls within the language,  
7 the extent "the extent to which each of the proposed  
8 operations will be integrated, the overall educational  
9 operation and objectives of the respective  
10 applicants." That's got to have a certain subcriteria  
11 and I don't know what they are and I'd like somebody  
12 to tell me, so I'd like Sable and Trinity to brief  
13 that for me and if the Bureau would like to be  
14 involved in that, it may.

15                   I have the same question with respect to  
16 the second part, "whether other factors in the record  
17 demonstrate that one applicant will provide a superior  
18 FM education of broadcast service." What are those  
19 other factors? What has the Commission considered?  
20 What has the Review Board considered? I don't know.  
21 So I'd like them to brief that for me, so that when  
22 everyone goes into the hearing, everyone knows what  
23 the law is, and everyone's working on the same page.

24                   MR. EDMUNDSON: You know, your honor, I  
25 think that paragraph 12, and I'll tell you, I missed

1 that totally.

2 What it seems to say is that were Sables  
3 still mutually exclusive, it would not come under the  
4 confines of the standard comparative issue. That's  
5 what it seems to say. I meant Sable, I'm sorry. If  
6 Gadsden stayed --

7 JUDGE STEINBERG: Yeah, right.

8 MR. EDMUNDSON: If it were in the case, it  
9 would not come under the standard comparative issue.  
10 And I must say that I don't know why that is, or the  
11 contingent here.

12 JUDGE STEINBERG: Well, I think that's  
13 moot --

14 MR. EDMUNDSON: Yeah, yeah.

15 JUDGE STEINBERG: So I don't want to get  
16 into that. I don't understand it. I know there's a  
17 reason for it. Well, anyway, I just don't want to get  
18 into it, cause I don't have to.

19 MR. EDMUNDSON: Okay. Well, I would also  
20 say too that, and again, technically we're still in  
21 the case, and it would probably be our position that  
22 if we somehow remain in the case, that issue four  
23 would not be relevant to our case, to Gadsden's case.

24 JUDGE STEINBERG: You mean five --

25 MR. EDMUNDSON: Well, I meant four.

1 JUDGE STEINBERG: You meant four?

2 MR. EDMUNDSON: Yeah.

3 JUDGE STEINBERG: Oh, well --

4 MR. EDMUNDSON: Yeah, frankly.

5 JUDGE STEINBERG: Okay. Let's correct  
6 that. If that ever happens, we'll maybe revisit the  
7 matter, but, okay. As I said, I want someone to brief  
8 for me, and preferably a joint brief. Of course that  
9 would be wonderful, if everybody agreed to what the  
10 criteria were, that way everybody would be fighting  
11 the same battle. And I think a good time for me to  
12 get the brief, and for the applicants to concentrate  
13 on that would be at the time the exchange of the  
14 written direct case is, and that's August 11th, so  
15 I'll set August 11th as a date to file briefs, plural,  
16 or briefs, singular, but preferably a joint brief  
17 outlining what criteria are used in Issue Five and  
18 providing me with the relevant citations so I can go  
19 read them.

20 I'm not going to issue an order on this,  
21 so it's up to, perhaps, Ms. Laden or Mr. Edmundson can  
22 communicate this to the people who aren't here, but  
23 August 11th is the date that I am going to set so that  
24 when the direct cases come in, also submitted will be  
25 some kind of a brief or memorandum outlining what the

1 law is on this.

2 Now, the question that I had, which can't  
3 be addressed, pertains to discovery, and I wanted to  
4 know whether any discussions have been held for the  
5 purpose of exploring discovery. If not, they haven't  
6 been held, when are they going to be held? And what  
7 discovery is contemplated?

8 I'd also like to state, with regard to  
9 discovery, I want the applicants to make a good faith  
10 attempt to work out their differences among  
11 themselves. They should make serious and genuine  
12 efforts in this regard, and to try to reach compromise  
13 with each other whenever that's possible.

14 I don't want anybody coming to me for a  
15 ruling on a discovery matter without first attempting  
16 to reach an agreement and first making a real good  
17 faith-heart attempt to reach an agreement. If you  
18 need a ruling, I want you to come to me only if  
19 there's a total and complete inability to reach any  
20 kind of an accommodation. If you absolutely reach  
21 loggerheads, then come to me, because I don't want to  
22 be involved in discovery if I don't have to be  
23 involved in discovery. Everybody in the room is very  
24 experienced counsel, and they basically know what they  
25 can get and what they can't get, and I don't think

1 it's necessary to come to me if that can be avoided.  
2 And again, they're going to have to read this in the  
3 transcript. And I'm was going to ask if there are any  
4 other discovery matters that anybody wanted to  
5 discuss. But --

6 Now, the last thing I have, or the next-  
7 to-the-last thing is whether there is anything anybody  
8 wants to bring up with me?

9 (Pause.)

10 So, hearing nothing, I'll go on to the  
11 final thing, and that is, all the procedural dates  
12 were set in my May 24th order prior to pre-hearing  
13 conference, which is FCC92M-493 and I wanted to ask if  
14 anybody has any problems with any of these dates?

15 (Pause.)

16 So I guess that's it. Anything else?

17 (Pause.)

18 So I thank you for coming. It's nicer  
19 than speaking to an empty room.

20 (Laughter)

21 (Whereupon, at 9:23 a.m., the pre-hearing  
22 conference was concluded.)

23

24

25



C E R T I F I C A T E

This is to certify that the attached proceedings  
before the FEDERAL COMMUNICATIONS COMMISSION  
in the matter of: APPLICATIONS OF SABLE COMMUNITY BROADCASTING

Docket Number: 92-70

Place: Hobson, Alabama

Date: June 18, 1992

were held as herein appears, and that this is a true  
and accurate record of the proceedings.

CAPITAL HILL REPORTING, INC.

BY Miles Anderson  
Official Reporter